

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
Assigned on Briefs May 21, 2008

**CHARLES MONTAGUE v. HOWARD CARLTON, WARDEN**

**Direct Appeal from the Criminal Court for Johnson County  
No. 3951 Lynn W. Brown, Judge**

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**No. E2007-02823-CCA-R3-HC - Filed September 11, 2008**

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The pro se petitioner, Charles Montague, appeals as of right the Johnson County Criminal Court's summary dismissal of his petition for a writ of habeas corpus challenging his 1993 convictions and resulting sentences for various drug offenses. On appeal, the petitioner contends that (1) the trial court erred in summarily dismissing the petition, (2) the trial court was required to determine the petitioner's indigency status prior to ruling on the merits of the petition, and (3) the trial court was required to enter written findings of fact and conclusions of law when ruling on the petition. Following our review, we affirm the judgment of the habeas corpus court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Charles Montague, Mountain City, Tennessee, *pro se*.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; and Tony Clark, District Attorney General, for the appellee, the State of Tennessee.

**OPINION**

The record reflects that the petitioner was convicted of possession of cocaine for resale, possession of marijuana, and possession of drug paraphernalia after a 1990 jury trial in the Johnson County Criminal Court. However, this court reversed the convictions on appeal and remanded the cases for retrial. State v. Charles Montague, 03C01-9105-CR-134, 1991 WL 236724 (Tenn. Crim. App. Nov. 15, 1991). During the pendency of the retrial for the drug offenses, the petitioner was convicted of first degree murder and sentenced to life imprisonment; this court affirmed the conviction and sentence on appeal. State v. Charles Montague, No. 03C01-9306-CR-00192, 1994 WL 652186 (Tenn. Crim. App. Nov. 21, 1994), app. denied (Tenn. Apr. 10, 1995). Upon retrial in 1993 for the drug offenses, the defendant was once again convicted of possession of cocaine for resale, possession of marijuana, and possession of drug paraphernalia. The trial court sentenced the defendant to six years for the cocaine offense and eleven months and twenty-nine days for the

misdemeanor offenses. The trial court further ordered all sentences to be served consecutively to one another and consecutively to the life sentence previously imposed for the first degree murder conviction. This court affirmed the judgments of the trial court in the drug cases. State v. Charles Montague, 03C01-9406-CR-00233, 1995 WL 509426 (Tenn. Crim. App. Aug. 29, 1995), app. denied (Tenn. Dec. 28, 1995). The petitioner unsuccessfully sought post-conviction relief from the drug convictions, the denial of which was affirmed by this court. Charles Montague v. State, E2003-01330-CCA-R3-PC, 2001 WL 1011464 (Tenn. Crim. App. Sept. 4, 2001).

In February 2002, the petitioner filed this petition for a writ of habeas corpus challenging the drug convictions. The petition alleges that the convictions are based upon insufficient evidence and that a fatal variance exists between the proof and the indictment. Additionally, the petition alleges that the sentences of six years and eleven months and twenty-nine days have expired. The state filed a motion to dismiss the petition because the challenged sentences were imposed consecutively to the previously imposed sentence of life imprisonment; therefore, the petitioner had not begun to serve the sentences and could not allege that they had expired. The trial court agreed and summarily dismissed the petition.

#### ANALYSIS

Tennessee law provides that “[a]ny person imprisoned or restrained of his liberty under any pretense whatsoever . . . may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment.” Tenn. Code Ann. § 29-21-101. Habeas corpus relief is limited and available only when it appears on the face of the judgment or the record of proceedings below that a trial court was without jurisdiction to convict the petitioner or that the petitioner’s sentence has expired. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993). To prevail on a petition for a writ of habeas corpus, a petitioner must establish by a preponderance of the evidence that a judgment is void or that a term of imprisonment has expired. See State ex rel. Kuntz v. Bomar, 214 Tenn. 500, 504, 381 S.W.2d 290, 291-92 (1964). If a petition fails to state a cognizable claim, it may be dismissed summarily by the trial court without further inquiry. See State ex rel. Byrd v. Bomar, 214 Tenn. 476, 483, 381 S.W.2d 280, 283 (1964); Tenn. Code Ann. § 29-21-109. We note that the determination of whether to grant habeas corpus relief is a matter of law; therefore, we will review the habeas corpus court’s ruling de novo without a presumption of correctness. Summers v. State, 212 S.W.3d 251, 253 (Tenn. 2007); Smith v. Lewis, 202 S.W.3d 124, 127 (Tenn. 2006).

#### Propriety of Summary Dismissal

In his first issue, the petitioner alleges that the trial court erred in summarily dismissing his petition for habeas corpus relief. In its order denying relief, the habeas corpus court noted that the petitioner is currently serving a life sentence for first degree murder and that his sentences for the drug offenses were ordered to be served consecutively to the life sentence; therefore, the habeas corpus court found that the petitioner’s allegation of an expired sentence in the drug cases was premature. On appeal, the petitioner insists that the judgments for the drug cases are void on their face because: (1) they do not include pretrial jail credits to which he is entitled, (2) the sentences have expired, (3) there was a fatal variance between the indictment and the proof at trial rendering

the evidence insufficient to support the convictions, and (4) the sentences were imposed in contravention to Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004).

To the extent that the petitioner now attempts to raise additional claims that were not presented in the petition before the habeas corpus court, i.e. pretrial jail credit and Blakely claims, we conclude that the petitioner is precluded from raising additional claims for the first time on appeal. State v. Adler, 71 S.W.3d 299, 303 (Tenn. Crim. App. 2001). Furthermore, neither claim would be cognizable in a habeas corpus proceeding as presented in this case. See Mark Grimes v. Tony Parker, Warden, W2007-00169-CCA-R3-HC, 2008 WL 141129, at \*3 (Tenn. Crim. App. Jan. 14, 2008) (generally, habeas corpus is not the proper avenue to address pretrial jail credits); Gary Wallace v. State, W2007-01949-CCA-R3-CO, 2008 WL 2687698, at \*2 (Tenn. Crim. App. July 2, 2008) (courts have consistently held that Blakely claims are not cognizable in a habeas corpus proceeding). Similarly, the allegation regarding a fatal variance and the related sufficiency of the evidence is also not cognizable in a habeas corpus proceeding. Gant v. State, 507 S.W.2d 133, 136-37 (Tenn. Crim. App. 1973). As to the remaining allegation regarding the expiration of the sentences we note that, contrary to the state's assertion and the habeas corpus court's finding, recent supreme court cases hold that an invalidity of a judgment arises at the time of entry of the judgment, and a petitioner is not foreclosed from habeas corpus relief until another sentence is served. See Hoover v. State, 215 S.W.3d 776, 778-78 (Tenn. 2007); Smith v. Lewis, 202 S.W.3d 124, 128 (Tenn. 2006). Therefore, the petitioner was entitled to *seek* habeas corpus relief from these sentences. However, having concluded that none of the petitioner's allegations merit habeas corpus relief, we conclude that summary dismissal was appropriate in this case.

#### Indigency Determination

In his second issue, the petitioner contends that the trial court erred in failing to determine his indigency status. The court's order dismissing the habeas corpus petition included the language, "The court makes no finding regarding indigency of the petitioner since the affidavit to such is not properly verified." The petitioner argues that the habeas corpus court was required to make a determination of his indigency prior to ruling on the merits of the petition. We note that no ruling was required by the trial court because the petition clearly failed to state a cognizable claim. See State ex rel. Edmondson v. Henderson, 421 S.W.2d 635, 636-37 (Tenn. 1967). As noted by our supreme court, "the liberal procedural safeguards of the Post-Conviction Procedure Act [have not been incorporated] into the provisions governing habeas corpus." Summers, 212 S.W.3d at 261. As such, the necessity of the determination of a petitioner's indigency status is left to the discretion of the trial court. Id. Therefore, we conclude that the trial court did not err in making no finding regarding the petitioner's indigency.

#### Sufficiency of Habeas Court's Findings

In his final issue, the petitioner contends that the habeas corpus court failed to make sufficient written findings when denying his petition for a writ of habeas corpus. Contrary to the

petitioner's assertion, the habeas corpus court's order clearly recites the basis for the summary dismissal. Therefore, we conclude that this issue is without merit.

#### CONCLUSION

Having concluded that the petition for a writ of habeas corpus should have been summarily dismissed for failure to state a cognizable claim, the judgment of the trial court is affirmed.

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THOMAS T. WOODALL, JUDGE